No. 2825

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL SURETY COMPANY,
Plaintiff in Error

vs.

COUNTY OF LINCOLN,
Defendant in Error

REPLY BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the District of Montana.

OREGON PRINTING CO., PORTLAND, ORE.

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I.

STATEMENT OF THE ISSUES

In the complaint filed by the County of Lincoln, the Coast Bridge Company, a corporation, and the National Surety Company, a corporation, are named as defendants, but the Coast Bridge Company was not served with summons and did not appear, and is not a party to the judgment in the case.

In the complaint it is alleged, in substance, that on the 18th day of December, 1911, the Coast Bridge Company entered into a contract with the County of Lincoln for the construction of a bridge across the Kootenai River, at Rexford, Montana, by the terms of which contract the Coast Bridge Company, for a stated consideration, was to construct the bridge according to certain definite plans and specifications, which were made a part of the contract.

It is further alleged in the complaint, in substance, that on February 5th, 1912, the County of Lincoln and the Coast Bridge Company made a further contract with respect to the bridge in question providing for certain modifications in the specifications, which were a part of the contract of December 18, 1911. The contract of February 5, 1912, together with the plans and specifications, which are made a part of said contract, are attached to and made a part of the complaint, marked exhibit "A." It is alleged in this connec-

tion that by the terms of such changed and altered specifications, the Coast Bridge Company agreed that piles, used in the construction of the bridge, should be driven with a hammer weighing not less than 2000 pounds and that the penetration under the last blow of such hammer, falling 20 feet, should not exceed one-half inch, and that, if necessary, such piles should be shod with steel or cast iron shoes and properly ringed at the top to prevent their splitting or brooming.

It is further alleged, in substance, that on December 18, 1911, in consideration of said contract, the Coast Bridge Company and the National Surety Company executed and delivered to the County of Lincoln their obligation in writing, in the penal sum of $30,000.00, conditioned that if the Coast Bridge Company should faithfully observe and comply with all the terms and provisions in said contract, and the changed and altered plans and specifications mentioned, and should well and faithfully perform all matters and things by them undertaken to be performed under said contract, then the obligation should be null and void, otherwise to be and remain in full force and effect. A copy of the bond referred to is attached to and made a part of the complaint, marked exhibit "B."

It is further alleged, in substance, that during the construction of the bridge in question the County of Lincoln paid to the Coast Bridge Company $30,000.00 according to the terms and condi-

tions of said contract and specifications thereto annexed, but that said payment was made without knowledge, on the part of the County or any of its officers, that the bridge was not being constructed in accordance with said contract and the plans and specifications; it is alleged that the failure on the part of the Coast Bridge Company to construct the bridge in accordance with such contract and specifications was a fact wholly and exclusively within the knowledge of the defendant Coast Bridge Company and that the plaintiff, its officers and agents, had no knowledge, or means of knowledge, of such failure on the part of the defendant Coast Bridge Company; it is alleged that the plaintiff could not, by the exercise of reasonable, or any diligence, have discovered or known of the defective construction of said bridge until after each and all of the payments had been made to the Bridge Company. It is further alleged in this connection that the Coast Bridge Company, with intent to deceive and defraud the County, pretended that such bridge was constructed in accordance with said contract and specifications and the County, wholly relying upon such false and fraudulent representations, made such payments.

It is alleged, in substance, that the Coast Bridge Company failed and neglected to drive the piling with a hammer weighing not less than 2000 pounds, falling 20 feet, so that the penetration at the last blow did not exceed one-half inch, but,

on the contrary, so drove such piling that at the last blow thereof, in each and every one of such piling for the middle pier of said bridge, would have been driven at least six inches with a hammer weighing 2000 pounds and falling 20 feet, and that by reason of the failure and neglect of the Coast Bridge Company to drive said piling in accordance with the terms of said specifications, the foundation of the middle pier became, and was at all times, insecure and unsafe, and by reason of the bottoms resting on insecure and shifting gravel and sand, occasioned by the Coast Bridge Company's failure to drive such piling in accordance with such specifications, the foundation of said middle pier was placed in great danger of being undermined and destroyed, and that thereafter, in the spring of 1913, by reason of the failure and neglect of the Coast Bridge Company as aforesaid, said center pier was washed away and destroyed, and the entire bridge structure resting thereon entirely collapsed and rendered useless by no fault of the County, and to the damage of the County in the sum of $30,000.00.

The record shows that in the course of the trial it was stipulated that the plaintiff might amend its complaint, making the original contract of December 18, 1911, and the contract of February 5, 1912, a part of the complaint and attached them thereto as exhibit "A."

The National Surety Company filed an answer wherein the allegations of the complaint were both

generally and specifically denied, except the National Surety Company admitted the execution of the bond, exhibit "B," which was attached to plaintiff's complaint.

The case was tried upon the issues joined between the County of Lincoln and the National Surety Company, and judgment rendered on April 11, 1916, against the National Surety Company in the sum of $29,345.40, together with costs.

II.

THE EVIDENCE

The evidence in the record on the questions presented upon this appeal shows:

1. That on December 18, 1911, the Coast Bridge Company and the County of Lincoln made a written contract for the construction of a bridge across the Kootenai River, at Rexford, Montana, according to certain plans and specifications, which were attached to, and made a part of, the contract. (Pgs. 63-85.)

(a) The contract of December 18, 1911, contained the following provision:

> "The Bridge Company promises and agrees to furnish the material fabricated and erected for a two span riveted bridge over the Kootenai River, at Rexford, Montana, together with three concrete piers, * * * as per plans and specifications above referred to and hereto attached." (Pg. 64.)

(b) "The Bridge Company promises and

agrees to furnish and construct in place any additional concrete required in said piers, below water, for $15.00 per cubic yard, and any additional concrete required in said pier above water for $10.00 per cubic yard. It is further agreed and understood that should the County deduct any concrete from said piers, which is hereby made optional with said County, the Bridge Company will allow the County the sum of $13.00 per cubic yard for all concrete so deducted below water, and the sum of $8.00 per cubic yard for all concrete deducted above water." (Pgs. 64-65.)

(c) "It is further agreed and understood that should piling be required under any of the piers, the price to be paid for said piling shall be 40 cents per lineal foot, and the length of such piling shall be specified and determined by the County or its representatives." (Pg. 65.)

(d) "The Bridge Company hereby covenants and agrees and promises to and with the County to build the said bridge and all its parts in accordance with the plans, drawings and specifications hereto attached, and made a part of this contract, designated as plan 'A' Sheets numbers 1 and 2." (Pg. 65.)

(e) "The Bridge Company promises and agrees to begin the construction of said bridge on or before the first day of August, 1912,

and to complete the construction of said bridge on or before the first day of May, 1913." (Pg. 65.)

(f) "The Bridge Company promises and agrees to furnish an indemnifying bond in the sum of $30,000.00 with the National Surety Company as surety thereon for the faithful performance of this contract, and such bond shall be accepted by the County before this contract shall be in force and effect." (Pgs. 65-66.)

(g) "The Bridge Company promises and agrees to submit to the County for approval the shop drawings of the steel parts and members of said bridge." (Pgs. 66-67.)

(h) "Should the County at any time order alterations, deviations, additions or omissions not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation." (Pg. 67.)

(i) "And the said County does hereby promise and agree with and to the Bridge Company that when the said bridge is completed the County will, in consideration of the covenants and agreements being strictly performed and kept by the Bridge Company, as specified herein, well and truly pay, or cause to be paid

unto the Bridge Company the sum of $24,-252.00 in the manner following: Upon the completion of the concrete piers 25% of the above mentioned price. Upon the arrival of the steel for the aforesaid bridge at the bridge site 50% of the above mentioned price. Upon the completion of the bridge the remaining 25% of the above mentioned price within 30 days after the acceptance of the bridge by the County." (Pgs. 63-64.)

(j) "It is further agreed and understood by and between the parties hereto that this contract shall not take effect until the War Department of the United States has approved the plans and specifications and granted permission for the construction of said bridge, and the authority for the construction of the same shall have been granted by the Congress of the United States." (Pg. 65.)

The specifications provide:

(a) "For two 200 foot riveted spans resting on one stream pier and two shore piers, together with the necessary wooden approaches. Plan 'A' Sheet '1'." (Pg. 70.)

(b) "All approaches and spans shall be of such length as the local engineer may designate, but no approach shall have a greater grade than 5%, * * * These approaches shall have the piles, and caps and joists called for on the accompanying plans." (Pg. 74.)

(c) "Piles are to be cut from live trees, and not to be less than 12 inches at the large end and not less than 9 inches at the small end, * * * if found necessary in driving all piles shall be shod with steel or cast iron shoes to prevent their splitting or crushing under rapid blows of the hammer." (Pg. 76.)

(d) "The piers and abutments shall be sunk to the elevation called for on the plans, * * *

"After excavation is made to the full depth; piles shall be driven inside if so ordered by the engineer." (Pg. 82.)

(e) "All piles shall be called for under specifications and shall be of the length called for on the plans, or of any length necessary to fulfill the following specifications as to driving:

"Piles shall be driven with a hammer weighing not less than 2000 pounds, and penetration under the last blow of the hammer falling 20 feet shall not exceed one-half inch. If necessary they shall be shod with steel or cast iron shoes, and properly ringed at the top with wrought iron rings to prevent them from splitting or brooming. All piles which are broken, split or badly broomed and **in the opinion of the engineer are not satisfactory, must be withdrawn and replaced with other piles to the satisfaction of the engineer or inspector in charge.**" (Pg. 84.)

(f) "All work either described or shown herein shall be executed with good material and in good workmanlike manner and shape, acceptable to the Board of County Commissioners of Lincoln County, Montana, or their duly authorized representative." (Pg. 85.)

2. The complaint and the record each fail to show any bond executed by the Coast Bridge Company for the performance of the contract of December 18, 1911, otherwise than the recital in the bond given on December 20, 1911, wherein it is recited that the bond heretofore furnished by the Coast Bridge Company shall be null and void and of no force and effect after the filing of the bond of the date of December 20, 1911. (Pgs. 27-28.)

3. The evidence shows that on December 20, 1911, the Coast Bridge Company as principal and the National Surety Company as surety executed a bond in favor of the County in the penal sum of $30,000.00; this bond is attached to and made a part of plaintiff's complaint, marked exhibit "B," (Pg. 26), and contains the following material recitals on this appeal:

(a) "Whereas, the Board of County Commissioners of Lincoln County have, since the 18th day of December, 1911, changed and altered the original plans and specifications of the details for the erection of said bridge at Rexford, Montana, and the Coast Bridge Company, the principal herein, has made and en-

tered into a new contract with the County of Lincoln, Montana, in accordance with the changed plans and specifications, and by the terms, conditions and provisions of which the said Coast Bridge Company, the principal herein, is to and shall furnish all labor and material and do certain work, to-wit: For the erection complete of a two span riveted bridge over the Kootenai River at Rexford, Montana, with three concrete piers; also the lumber and railings for said spans and all other material, all strictly in accordance with the amended and changed maps, plans and specifications therefor, and according to the terms of the contract aforesaid, all of which are made a part hereof." (Pg. 27.)

(b) "Whereas, the Board of County Commissioners have by an order duly made, ordered that the Coast Bridge Company file a new bond and undertaking in the sum of $30,000 conditioned for the faithful performance by the said Coast Bridge Company of all conditions of that certain contract entered into by and between the Coast Bridge Company and Lincoln County, Montana, in accordance with the amended plans and specifications, and that the bond heretofore furnished by the Coast Bridge Company shall be null and void and of no force and effect after the filing of the within obligation." (Pgs. 27-28.)

(c) The bond recites that if the Coast Bridge Company, the principal, shall faithfully observe and comply with the terms, conditions and provisions of said contract, and the changed and altered plans and specifications mentioned, etc., * * * then the obligation shall be null and void. (Pg. 28.)

4. The evidence shows that on February 5, 1912, a further contract was made by the Coast Bridge Company and the County of Lincoln with respect to the bridge in question. This contract is set out as a part of the complaint, marked exhibit "A". (Pgs. 8-9.)

This contract recites:

(a) That there was a contract made on December 18, 1911, for the construction of a steel bridge at Rexford, Montana, and that the County had decided to alter the dimensions of the bridge and increase its length, which necessitated alterations in the construction of the bridge.

(b) "The Bridge Company promises and agrees to alter and extend the bridge aforesaid, and to make all alterations, extensions and enlargements, and to erect and construct the said bridge in accordance with plans, drawings and specifications to be hereafter submitted by the Bridge Company to the County, and which said plans, drawings and specifications shall become, upon acceptance by the County, a part of said contract of De-

cember 18, 1911, and shall be annexed thereto and marked Plans for Rexford Bridge, and shall be substituted for the plans, drawings and specifications heretofore made a part of the contract of date December 18, 1911." (Pgs. 8 and 9.)

(c) "It is covenanted and agreed by the Bridge Company and the County that this contract shall become operative and effective upon the submission of the plans, drawings and specifications herein first mentioned to the County and the approval or acceptance of the same by the County, and not before." (Pg. 9.)

(d) The contract provides for additional compensation to be paid the Bridge Company in the amount of $3,487.00. (Pg. 9.)

The specifications which were to be later prepared and furnished by the Coast Bridge Company called for two 220 foot pin connected spans. (Pg. 11.)

The complaint and record fails to show any bond given by the Coast Bridge Company for the faithful performance of this contract of February 5, 1912; and the complaint and record fail to show that any bond was furnished at the time the contract of February 5, 1912, was made, or subsequent to that time, and the bond of December 20, 1911, by its terms excludes any obligation on the part of the surety for the performance of the con-

tract of February 5, 1912, or for the construction of any other bridge than the one referred to in the bond in accordance with the plans and specifications made a part of the bond obligation. The bond of December 20, 1911, by its terms excludes any obligation for the construction of the bridge under the original contract of December 18, 1911; providing expressly by its terms for the construction of the bridge under a **new** contract so named in the bond, but not the altered and modified specifications which are made a part of the bond; with the further express recital that the bond given by the National Surety Company for the performance of the original contract of December 18, 1911, should be cancelled.

There is no allegation in the complaint with respect to the terms and conditions of the new contract and the modified plans and specifications for the construction of the bridge at Rexford under the bond of December 20, 1911, and no evidence was offered, and the record is silent as to the contents of such contract and the specifications for the bridge thereunder.

The defendant bond company in this case is sued upon a bond obligation given for the performance of a contract, the terms and conditions of which are not disclosed by the pleadings or the evidence, and it is sued upon a contract of a subsequent date to the date of its bond with no connecting link between, the contract for which the

bond was given, and the contract on account of which the Bond Company was sued.

5. The contract of December 18, 1911, shows that the bridge contracted for was to consist of two 200 foot riveted spans, resting on three concrete piers. (Pg. 64.)

6. The defendant's bond under date of December 20, 1911, which is made a part of the plaintiff's complaint and sued upon in this case, recites that the bridge to be built or constructed under the "new contract" in accordance with the changed plans and specifications was a two span riveted bridge, resting on three concrete piers. (Pg. 27.)

7. The evidence in the case shows that the bridge constructed under the contract of February 5, 1912, consisted of two 220 foot pin connected spans, resting on one concrete pier and two shore tubular piers. (Pg. 11.)

8. The evidence shows that the location of the concrete stream pier was changed by the County after the construction of the bridge had been entered upon, and by order of the County the concrete stream pier was placed 16 feet further out in the stream where the river "had a bigger sweep at the pier;" (Pg. 106.); that when the County ordered this change in the location of the concrete stream pier the Bridge Company advised the County in writing, that the change in the location of the pier was more expensive than beneficial, but that if the County insisted upon the change the

Bridge Company would "proceed under force account" in the construction of the pier at the new location (Pg. 110); and after such notice, and presumably with such understanding, the pier was constructed by the Bridge Company at the new location. The construction of the pier at the new location if proceeded with under force account, would not fall within the terms of the contract or the obligations of the bond.

9. The contract of December 18, 1911, as well as the contract of February 5, 1912, shows:

(a) That the extent of the excavation for the piers was not definitely fixed on the plans or in the specifications but was left open for determination when the actual conditions should be known and provision was made in the contract for payment at so much a cubic yard for the concrete used in the excavation. (Pg. 23.)

(b) The plans and specifications were also left open on the question as to whether piling should be used in the foundations for the piers and the provision made that if piling were ordered by the engineer (Pg. 23) the County should pay 40 cents per lineal foot for the piling used; and the length of such piling should be specified and determined by the County, or its representatives. (Pgs. 64-65.)

The County reserved complete charge over the construction of the bridge down to the approval of the shop drawings for the steel parts and mem-

bers of the bridge (Pgs. 66-67); and reserved to itself the right to determine the extent that concrete would be used in the base of the piers by providing a unit price for such concrete, and providing for a unit price if piling were used in place of the concrete. The Bridge Company could not, under any fair construction of the terms of the contract, determine the extent to which the concrete should be carried down in the base of the pier, or whether the cheaper piling construction should be used. The piling are shown (Pg. 102) to have cost the County $686.40, while the concrete to a depth of safety would have cost about $3000. The County by the terms of the contract did not leave it optional with the Bridge Company to determine which should be used, but reserved that authority to itself. The Bridge Company proceeded with the work of the foundation in the stream pier under the direction of the County, and was obliged to await the orders of the County, and await the inspection of the piling used in the foundation, after they were in place, before the concrete should be placed thereover. (Pg. 107.) The County, as shown by this record, was in control and the Bridge Company proceeded from time to time under the orders of the County.

10. The evidence shows that the piling used in the foundation for the center pier were 22 feet in length and were 8 inch square piling (Pg. 94); and that 62 piling were used; while the alternate plan for the bridge in case piling were used show-

ed the location of 38 piling in the pier.

The record shows that piling 22 feet long 8 inches square embedded 4 feet in the ground would sustain a weight of approximately 30,000 pounds, and that a 2000 pound hammer falling 20 feet would strike 40,000 pounds to the foot or 800,000 pounds, which would be 400% greater than the piling used would stand. (Pgs. 104-105.)

The plaintiff sought to show that the direct cause of the collapse of the bridge was the undermining of the concrete stream pier by the washing of the river. (Pg. 96.)

It was the plaintiff's theory that after the water had cut under the concrete in the base of the pier to a point beyond the center of the pier, the pier began to lean up-stream, and as the water continued to cut under the concrete, the pier gradually tipped up-stream until the weight of the pier sheared off the piling in the base. The evidence shows that all of the piling were sheared off by the concrete in the base of the pier, except 16 piling on the down-stream side, and the 16 piling were not pulled out, but were left protruding out of the concrete a distance of about 3 feet 8 inches. (Pg. 94.)

11. The record shows that the County and the Bridge Company, without the knowledge, consent or approval of the Bond Company, on July 26, 1912, changed the contract of December 18, 1911, with respect to the payment for the bridge, and

that the Board of County Commissioners by a formal resolution, modified the terms of said contract with respect to the payment for the bridge. (Pgs. 87-90.)

The resolution refers to a bridge to be constructed by the Coast Bridge Company near Troy, Montana, as well as the one to be constructed near Rexford, Montana, and modified the contracts for each of the said bridges. The resolution recites:

> "Whereas, the Board of County Commissioners have made certain alterations in the plans of the bridge to be erected across the Kootenai River near the village of Rexford, and
>
> "Whereas, each of the contracts (referring to the contract for the bridge at Troy and the bridge at Rexford) aforesaid provide for the payment of certain sums of money upon the completion of certain portions of said work, and * * * (Pg. 88.)
>
> "Whereas, the Coast Bridge Company has furnished good and sufficient bonds in the sum of $65,000.00 with the National Surety Company of New York as surety, conditioned for the performance of the terms and conditions of each of said contracts (Pg. 89), and
>
> "Whereas, the Coast Bridge Company are prosecuting said work in the construction of said bridges;
>
> "Therefore, Be It Resolved, that the terms and conditions of each of said contracts inso-

far as the payments owing and due under the said contracts, shall be changed and altered to the following manner (Pg. 89):

* * *

"Be It Further Resolved that this resolution shall be effective and become a part of the original contracts after the Coast Bridge Company shall have signed their acceptance and waiver of the change of the terms of the original contracts as herein specified and referred to." (Pg. 90.)

The County and the Bridge Company thus without the knowledge or consent of the Bond Company modified the provisions of the original contract with respect to the terms of payment, and by the resolution above referred to authorized the payment of $12,500.00 in advance (Pg. 90). This payment was made by the County under date of July 26, 1912 (Pg. 99), and a further payment made by the County to the Bridge Company in the amount of an additional $12,500.00 under date of October 21, 1912. (Pg. 100.) These payments were made before the work was done. The first payment of $12,500.00 was made before the work was commenced. The record shows that the Bridge Company started work on the Rexford bridge on September 21, 1912 (Pg. 105); the payment of $12,500.00 was made July 26, 1912 (Pg. 99). The record shows that the work was commenced on the construction of the center pier October 10, 1912 (Pg. 105), and the work on the

center pier was completed during the week ending December 14, 1912 (Pg. 110); and that on October 21, 1912, an additional sum of $12,500.00 was paid, making a total of $25,000.00 paid on the bridge up to October 21, 1912.

The record shows that the bridge was completed December 31, 1912 (Pg. 110).

The record shows that on December 28, 1912, the Board of County Commissioners formally accepted the bridge in question (Pg. 92), and made the final payment (Pg. 93).

The record shows that the contract was prepared by the County Attorney (Pg. 102), and that the information obtained for drawing the plans was obtained from the County Engineer of the County of Lincoln, and based upon a profile prepared by him (Pg. 104), and that John M. Duthie was the County Engineer (Pg. 98), who did not give so much attention to the work during construction as he did in the preliminary steps to the location of the bridge and the data in making designs (Pg. 98); that after the excavation had been made for the center pier to a depth of 8 feet 6 inches the Bridge Company notified the Commissioners, and Mr. Duthie, the County Engineer, came out and measured the excavation (Pg. 106); the Bridge Company then drove the piling, 62 in number (Pg. 106), which were inspected by the Commissioners (Pg. 106). The Bridge Company was requested not to put in any concrete in the base for the center pier after the piling had been

driven until the Commissioners were notified and could inspect the piling that had been driven (Pg. 107).

The plaintiff offered testimony to show that the Commissioners relied upon the judgment of the Bridge Company, and offered testimony tending to show that the Commissioners exercised no independent judgment in the matter at all, resting their performance of duty upon the statement that the Bridge Company had represented to the Commissioners that they were competent Bridge Engineers, and that if piling were necessary they would so advise the Commissioners, and the statement was made by Commissioner Pratt that: "We relied on their judgment and allowed them to proceed with the construction of the pier in the manner which they thought was dictated by their best judgment" (Pgs. 97-98).

The record shows the participation of the County in the preparation of the contract, bond and the plans and specifications, and the preparation of the data by the County from which the plans and specifications were drawn, and the presence of the County Engineer and the Commissioners from time to time during the course of the construction of the bridge, and the direction of the Commissioners particularly with respect to the location and construction of the center pier, and the inspection of the piling used in that pier. The record also shows the position taken by the County upon the trial, that the Commissioners exercised

no judgment in the matter whatever, but relied upon the judgment of the Bridge Company and allowed the Bridge Company to proceed with the construction of the pier in the manner it saw fit. The terms of the contract imposed upon the County the duty of direction and inspection in the course of the work and reserved to the County the duty of determining whether piling should be used in the foundation of the pier; and reserved to the County the right to determine to what extent concrete should be used in the excavation for the pier. By the terms of the contract these duties were contract duties resting on the County and became a part of the contract obligations of the County to the Bond Company. If the bridge failed by reason of failure in any respect on the part of the County to discharge this duty, which it contracted to discharge, it would not be in a position to enforce an obligation against the bond for the failure of the Bridge Company to discharge an obligation which the County was to discharge. The matter of whether or not piling was to be used in the foundation of the pier was not determined by the contract, or by the plans and specifications. The matter of whether piling would be used was left to be determined as the work proceeded after excavation had been made and the conditions were known.

The terms of the bond would not cover a failure either on the part of the Bridge Company or the County to correctly determine whether piling

should or should not have been used. Nor would the terms of the bond cover a failure on the part of the County and the Bridge Company to correctly determine to what extent concrete should be used in the excavation for the base of the pier. Or to correctly determine whether concrete should be used exclusively in the base of the pier. If the County, by the terms of the contract, owed any duty to determine these matters properly, and owed any duty to properly inspect the work to see that it was done as required and the County failed to properly do so, it cannot complain and hold the Bond Company for a failure of the bridge because of improper construction, with respect to such matters.

12. The contract made a part of the complaint recites:

That it is not to take effect until the War Department shall have approved the plans and specifications for the bridge (Pg. 66).

There is no allegation in the complaint that such approval was secured; and there is no evidence in the record that such approval was secured. The change in the location of the bridge and center pier was made under the verbal direction of the Commissioners without any formal change being made in the plans, so that the matter could not receive the attention of the War Department (Pg. 105).

The center pier was the one which failed and this change was made without any modification in

the plans, precluding any possibility of a presumption that the War Department approved the location of the pier, and the change in the location of the pier was a material fact in connection with the failure of the bridge. The record showing with reference to this change the following:

> "It would throw the pier that was not quite in the center of the river, further out in the center of the river, and the river swirling around this way, would have a bigger sweep at the pier than it would have if it had been left 10 feet further away to the Rexford shore" (Pg. 106).

The Bond Company, if contracting for the performance of the contract of December 18, 1911, could not be held by the County if the approval of the War Department had not been secured because by the terms of the contract it was not to become effective until that approval was secured. The War Department presumably would exercise some judgment as to the proper location of the pier in the river, in order to protect the rights of the Government and the public upon navigable streams. The Government, presumably, would not sanction a change in the location of a pier to a position where it would be more exposed to dangers from the river, and where such dangers could be avoided and the bridge properly constructed with the pier located at another point. The Bond Company would have a right to the

judgment of the War Department if the contract was conditioned that that judgment should be secured.

13. The contract of February 5, 1912 (Pg. 9), provides that it shall not become operative or effective until the submission of plans, drawings and specifications to the County and the approval and acceptance thereof by the County. This contract by its terms provides for a complete new set of plans and specifications to be prepared by the Bridge Company and later submitted to the County for its acceptance and approval. This substitution of complete plans and specifications was without the knowledge, consent or approval of the Bond Company. The contract and the new plans and specifications were made as of date February 5, 1912; the bond in question as of date December 20, 1911, and has to do with the performance of a particular contract referred to in the terms of the bond.

III.

ASSIGNMENTS OF ERROR

The National Surety Company on May 29, 1916, presented and filed with its petition for a Writ of Error (Pgs. 128-131), the following assignments of error:

1. The District Court of the United States, for the District of Montana, erred in overruling and denying the objection to the introduction of any evidence on the part of the plaintiff in support of

its complaint as amended, which objection was based upon the ground that said complaint as amended does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling and denying the motion of the defendant National Surety Company made at the close of the testimony for judgment in its favor.

3. The said court erred in holding and deciding that the complaint as amended states a cause of action.

4. The said court erred in holding and deciding that the change and modification in the contract, as made by the resolution of July 6, 1912, and the acceptance thereof by the defendant Bridge Company did not relieve and release the defendant the National Surety Company from the liability provided for in the bond furnished by said Surety Company.

5. The said court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the plaintiff having made payments of the contract price to the Bridge Company before said payments were due according to the contract between said plaintiff and said Bridge Company.

6. The said court erred in holding and deciding that the defendant National Surety Company was not released and relieved from liability by reason of the change in the location of the center pier and the lowering of the floor of the bridge,

which constituted material departures from the plan for the construction of the bridge, adopted by the contract between said plaintiff and the Bridge Company.

7. The court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding there is neither allegation nor proof that the plans and specifications for the bridge had been approved by the War Department of the United States, or that permission for the construction of said bridge had been obtained from said Department.

8. The court erred in holding and deciding that the plaintiff was entitled to recover, notwithstanding the failure of the plaintiff to appoint an engineer or inspector to supervise and superintend the work of construction of said bridge and by failing to take any precaution to insure the performance of the contract with said Bridge Company.

9. The court erred in holding and deciding that the plaintiff is entitled to recover, notwithstanding the bond furnished by the defendant National Surety Company has reference to a contract for the construction of a "two span riveted bridge * * * together with three concrete piers * * * while the bridge which was built was a two span pin connected bridge with one concrete and two tubular piers."

10. The court erred in rendering judgment for the plaintiff.

IV.

POINTS AND AUTHORITIES ON THIS APPEAL

1. The complaint does not state a cause of action.

(a) It is not alleged in the complaint that the plaintiff performed its part of the contract.

There were mutual obligations on the contracting parties imposed by the terms of the contract. There were certain obligations imposed directly upon the County, and the failure to discharge them would result in a failure of consideration for obligations assumed by the Bridge Company under the terms of the contract. It was essential that the County allege that it had performed the terms of the contract on its part to be performed. It would have been sufficient if the County had alleged in general terms the performance of the conditions of the contract on its part to be performed. There was no special or general allegation in the complaint of the performance of the conditions of the contract on the part of the County.

(b) It is not alleged that the War Department of the United States approved the plans and specifications for the bridge. The contract by express terms provides that it should not take effect until the War Department of the United States had approved the plans and specifications.

This requirement by the terms of the contract was made a condition precedent. The rule is well

settled that the plaintiff must allege the performance of precedent conditions in seeking to recover on a contract containing such conditions.

In Encyclopedae of Pleading & Practice, Vol. 4, 627, it is said:

> "A condition precedent calls for the performance of some act, or the happening of some event, after the terms of the contract have been agreed upon, before the contract shall take effect; that is to say, the contract is made in form but does not become operative as a contract until some thing or act is performed before some subsequent event occurs." (627.)
>
> "While a condition that qualifies or defeats the plaintiff's claim, being a condition subsequent, may be safely ignored by the plaintiff in his pleading, it may be stated as a general rule that performance by the plaintiff of a precedent condition must be averred in the complaint or declaration." (628.)
>
> "The performance of a condition precedent to be executed by one other than the plaintiff must likewise be averred." (629.)
>
> "In lieu of allegations of performance the plaintiff may allege facts in excuse of nonperformance." (629.)
>
> "It is provided by statute in many of the states that in pleading performance of conditions precedent in a contract, it is not necessary to state the facts constituting perform-

ance, but the party may state generally that he duly performed all the conditions on his part." (633.)

"The legal effect of the general averment is that the plaintiff has specifically performed each and every act and thing required by the terms of the contract upon which the action is brought." (634.)

"Performance by a third party not the plaintiff in the case nor necessarily a party to the contract, may be averred in general terms under such statutes." (634.)

"The use of the general averments as so authorized is optional and the plaintiff is at liberty to allege performance by stating the facts which constitute it, but if he undertakes to make a specific allegation of performance he must make it with particularity and the strictness required by the rules of the Common Law." (635.)

In Rockford Insurance Co. vs. Nelson, 65 Ill. 415, the court say in the syllabus:

"When precedent conditions are not set out in the declaration, there will be such a variance as to exclude the contract or obligation as evidence."

In National Surety Co. vs. Schneidermann (Ind.), 96 N. E. 955, in the syllabus the court say:

"When the terms of a surety contract are made conditions precedent to the obligees

right of recovery, compliance therewith must be alleged and proven by the obligee, or a judgment against a surety cannot be supported upon special findings which do not expressly find performance or waiver of conditions precedent."

In Texarkana & Ft. S. Ry. Co. vs. Parsons, 74 Fed. 408, the court say in the opinion at page 411:

> "There was not only no suggestion that the Secretary of War had approved the narrowing of the openings on each side of the pivot pier, but it does not appear that he approved the location of the bridge or the plans, or any plans whatever, relating to its construction. Indeed, for anything contained in the record before us, this bridge was constructed in entire violation of law. * * * The Act of Congress is mandatory, that 'the bridge shall not be built' until certain things have been done. The complaint avers that these things were not done, but there is no evidence in the record tending to show that they were done, and in the absence of proof there is no presumption that they were done."

(c) The bond of the National Surety Company of December 20, 1911, is made a part of the complaint, marked exhibit "B."

This bond contains three important recitals going to the question of the sufficiency of the complaint, viz:

(1) That a contract had been made between the County and the Bridge Company under date of December 18, 1911, and a bond had been furnished under that contract.

(2) That changes had been made in the plans and specifications and a new contract with changed plans and specifications had been made by the County and the Bridge Company, and a new bond was to be given.

(3) That by order of the Commissioners the bond for the performance of the contract of December 18, 1911, was cancelled and a new bond for the performance of the new contract was ordered to be given.

The contract of February 5, 1912, is attached to and made a part of the complaint, but there is no allegation in the complaint showing that by the terms of the new contract referred to in the bond, for the performance of which the bond was given, it carried any obligations on the part of the Bond Company for the performance of the contract of February 5, 1912. The bond by its terms shows that it was given for the performance of one contract, the terms and conditions of which are not disclosed by the complaint nor the evidence.

So by the recitals of the bond, made a part of the complaint, it appears that the bond given for the performance of the contract of December 18, 1911, was cancelled and a new bond taken for the performance of a new contract with changed plans

and specifications. The new contract with the changed plans and specifications and the obligations of the parties thereto are not made a part of the complaint, nor are the conditions of such "new contract" stated in the complaint, nor was such contract offered in evidence.

(d) It is not alleged that the National Surety Company had any knowledge of, consented to or approved the altered or modified plans and specifications for the contract of February 5, 1912.

If the bond, exhibit "B," was given for the performance of the new contract with the changed plans and specifications and if the bond given for the performance of the contract of December 18, 1911, was cancelled the plaintiff cannot use the provisions of the contract of December 18, 1911, to aid in stating a liability on the new bond given for the performance of the new contract under date of December 20, 1911.

The plaintiff depends upon a provision in the contract of December 18, 1911, authorizing changes or alterations in the plans and specifications to hold the Bond Company for the results of construction under changed plans and specifications without the Bond Company's knowledge, consent or approval. The terms of the contract of December 18, 1911, are a part of the complaint and the provision relied upon by any fair construction would not justify the important changes sought to be made wherein the character of the

bridge, the length of the bridge, and the location of the concrete pier in the center of the bridge were all changed. And further, where the plaintiff comes forward with a contract of February 5, 1912, made a part of its complaint which by its terms provides for a complete set of new plans and specifications for the bridge to be later presented by the Bridge Company for the consideration and approval of the County. A provision in the contract of December 18, 1911, for alterations or modifications in the plans and specifications could not be extended to the point where the parties would be authorized to provide for complete new plans and specifications. The complaint shows upon its face that complete new plans and specifications are made a part of the contract of December 18, 1911, but this was done without the knowledge, consent or approval of the Surety Company, and without any allegation in the complaint of any knowledge, consent or approval on the part of the Surety Company. By the act of the County and the Bridge Company according to the allegations of the complaint embodying the provisions of the two contracts, the County and the Bridge Company did away with the provision in the contract of December 18, 1911, for alterations or amendments by doing away with the contract and substituting another one for it, but rely upon authority to substitute the contract of February 5, 1912, for the old and the new plans and specifications for the old under the terms of the

old contract authorizing alterations and modifications in the plans and specifications.

The contract of December 18, 1911, was not made a part of the complaint until during the course of the trial, when it was added to the complaint by amendment and upon stipulation of the parties. (Pg. 61.)

With the recitals in the two bridge contracts and the two sets of plans and specifications made a part of the complaint, and with the recitals in the bond given for the performance of still another contract, which is not made a part of the complaint, and the conditions and stipulations of which are not made known to the court, we submit that the complaint fails to state a cause of action against the Bond Company for failure to build the bridge as it is alleged according to the contract of December 18, 1911, with modified plans and specifications of February 5, 1912.

2. The Bond Company is released from any obligation to the County because the County and the Bridge Company, without the knowledge, consent or approval of the Bond Company, changed the contract for the construction of the bridge in question.

(a) The County and the Bridge Company without the knowledge, consent or approval of the Bond Company changed the contract as to the character of the bridge to be built from a two span 200 foot riveted steel bridge, resting on three con-

crete piers to a two span 220 foot pin connected bridge, resting upon one concrete pier and two tubular shore piers.

(b) The County and the Bridge Company without the knowledge, consent or approval of the Bond Company changed the location of the center concrete pier, moving it farther out into the stream in a more dangerous position by order and direction of the County without the knowledge, consent or approval of the Bond Company its location was so changed that "it would throw the pier that was not quite in the center of the river further out in the center of the river, and the swirling around this way would have a bigger sweep at the pier than it would have if it had been left 10 feet further away to the Rexford shore."

The bond attached to the complaint recites that it was given for the performance of a new contract for the erection complete of a two span riveted bridge over the Kootenai River at Rexford, Montana, together with three concrete piers.

The County with the Bridge Company changed completely the plans and specifications for the bridge in question, substituting entirely new plans and specifications; and changed the kind of a bridge, the length of the bridge, and the location of the bridge, all without the knowledge, consent or approval of the Bond Company, and still seek to hold the Bond Company for a failure to have the bridge constructed according to the contract of

December 18, 1911, with the modified plans and specifications of February 5, 1912.

The courts have quite generally held that a material change or departure in the contract or in the performance of it made by the principals of the contract without the knowledge, consent or approval of the surety would release the surety from any obligation for the performance of the contract according to its terms. But here we have the extreme situation of an entirely new set of plans and specifications for the work and a new contract with additional compensation in the amount of $3,487.00 provided for. It must be presumed that the additional compensation is because of additional construction required. The contract of December 18, 1911, fixed by definite plans and specifications the kind of a bridge to be built; fixed the compensation to be paid therefor, and the terms with respect to such payment; and fixed the time limit within which the bridge was to be built or completed, specifying that the work should be commenced not later than the first of August, 1912, and the bridge completed on or before the first of February, 1913. (Pg. 65.)

The contract of February 5, 1912, with the new plans and specifications which were to be later furnished by the Bridge Company, and which were to be substituted for the plans and specifications under the contract of December 18, 1911, provides for the additional consideration of $3,487.00 but

does not change the time limit within which the additional work must be done.

The record shows that the plaintiff assigned as the cause for the failure of the bridge that the foundation of the center pier was not properly constructed, and that the water cut under the concrete in the base of the pier, and that the piling were not sufficient, or had not been sufficiently driven to carry the weight of the pier and bridge, so that the court meets the situation of a complete change in the plans and specifications for the bridge, including the change in the character of the bridge to be built from a two 200 foot spans riveted bridge resting on three concrete piers to a two 220 foot spans pin connected bridge, resting on one concrete pier and two shore piers; and a material change in the location of the center concrete pier in the river; and a change in the contract itself providing for a complete set of new plans and specifications for the bridge; and for additional consideration in the sum of $3,487.00.

The Bond Company insists that it cannot be held under the terms of its bond for the performance of the contract referred to in the bond when the County and the Bridge Company, without its consent, substituted another contract with complete plans and specifications for a different kind of bridge than the one called for under the contract referred to in the bond.

The general rules applicable to the liability of a surety are well understood. The County and

the Bridge Company, without the consent of the Bond Company, could not change or increase its obligations to the County under the terms of the contract, for the performance of which the bond was given. The Surety Company contracted with the County for the performance of a particular contract. The failure of performance, if alleged, would necessarily be determined by the terms of the contract itself and the acts of performance thereunder. The County and the Bridge Company could not add to or take from the contract for the performance of which the bond was given, without the consent or approval of the Bond Company.

The claim is made here on behalf of the County that that consent was secured in advance because of a provision in the contract of December 18, 1911, as follows:

> "Third: Should the County at any time, order alterations, deviations, additions or omissions, not hereinabove provided for, from the said contract, specifications or plans, it shall be at liberty to do so, and the same will be added to or deducted from the amount of the said contract price, as the case may be, by a fair and reasonable valuation." (Pg. 67.)

It is the contention of the County that because of this provision in the contract of December 18, 1911, the County and the Bridge Company had authority to make the contract of February 5, 1912, providing for complete new plans and specifications for the bridge, which would be substi-

tuted for the plans and specifications in the contract of December 18, 1911, and that because of this provision the County and the Bridge Company had authority to change the length of the spans, increasing the length of the bridge some 40 feet and consequently the weight upon the center pier; changing the location of the center pier to a point of greater danger in the river; and changing from three concrete piers to one concrete pier with two tubular shore piers for the bridge; and changing from a riveted steel span bridge to a pin connected bridge, all without the consent and approval of the Bond Company, and still hold the Bond Company liable to the County for a failure of performance under the contract of December 18, 1911. The purpose of the provision in the contract of December 18, 1911, and the intention of the parties to the contract, as gathered from the meaning of the terms employed, do not justify such an extreme position on the part of the County. The words "alterations, deviations, additions or omissions" can hardly be construed to mean a complete change in the kind and character of the bridge contracted for.

The terms will be given a reasonable construction, and their ordinary meaning. The court will assume that in the ordinary course of construction slight modifications and changes are made necessary or desirable, and that the parties reserved the right to make such changes, but the limit is reached before we reach a new contract with complete

plans and specifications.

The Supreme Court of the United States in the case of United States vs. Freel, 186 U. S. 309, had occasion to consider the provisions in a contract that provided for alterations and modifications, and to consider the extent that such alterations and modifications could be carried within the terms of a bond guaranteeing performance of such contract.

In the case referred to there was a change in the length of the dry dock, increasing its length from 600 to 670 feet, and there was a change in the location of the dry dock, moving it some 164 feet further inland. The contract expressly provided for alterations and modifications, such as should be found advantageous and necessary in the course of the construction of the dry dock. In this situation the Supreme Court of the United States held the Bond Company not liable to the Government for the construction of the dry dock under the terms of the contract where the change had been made in the length of the dock and in its location above indicated. The court syllabus said:

> "The surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by a change made by the contracting parties without his consent in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at

an increased expense, and gave an increased time of performance, as such a change was not contemplated by the provisions of the contract for such changes in the plans and specifications as might be found advantageous or necessary.

"The objection that the surety should have set up as an affirmative defense by plea or answer and not by demurrer, the fact that such changes were made in the principal's contract as would release the surety if made without his consent, cannot be urged on appeal, where the declaration set out the original and supplemental contracts and contained no averments that the surety had knowledge of or consented to the changes made by the supplemental contract, and no leave to amend was asked when the demurrer was sustained."

And in the opinion at page 319 the court says:

"The declaration set out by attaching them as exhibits, the original and the two supplemental contracts, and it is alleged that the changes effected by the latter were made in pursuance of and in conformity with paragraph seven of the first contract. If upon the face of the agreement of August 17th, 1893, it appears that substantial changes were made in the location of the proposed structure, requiring additional excavation and connections at an increased expense, and extending the time limited by the contract for the comple-

tion of the dry dock, for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost, and time necessary for the completion of the work, operated to release the surety, if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the later had knowledge of the changes and consented thereto."

This court in American Bond Company vs. United States, 167 Federal 910, in referring to the Freel case, used the following language:

"The recent case of United States v. Freel, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177, is more in point, and is authority upon all the questions involved in this case. The action was against the principal and sureties on a contractor's bond, given to secure the performance of contract to construct a dry dock at the Brooklyn Navy Yard. The contract was between the contractor and the Chief of the Bureau of Yards and Docks in the Navy Department. It provided for the construction of a dry dock—

'to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part.'

The seventh paragraph of the contract provided (substantially as in the contract before the court) that:

'If at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract.'

It was further provided:

'That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of the dry dock, that the actual cost thereof shall be ascertained, established and determined by a board of naval officers to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract.'

It was further provided:

'That no change herein provided for shall in any manner affect the validity of this contract.'

A supplemental contract in writing was entered into between the contractor and the chief of Yards and Docks, providing that the location of the dry dock should be—'one sixty-four (164) feet further inland than laid down and staked out when the said contract

was entered into.' This supplemental contract provided full compensation to the contractor for the additional work, and it recited that it was under the provisions of and in accordance with article 7 of the original contract, but the surety was not a party to the supplemental contract. The contractor proceeded with the work under the original and supplement contract, but so slowly, negligently and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the contract forfeited on the part of the contractor, and thereafter, under the provisions of the contract, the Secretary of the Navy proceeded to complete the dry dock and appurtenances in accordance with the contracts, plans and specifications, at a cost to the United States of the sum of $370,000. The sum of $72,414.16 represented the damage sustained by the plaintiff in completing the contract. The suit was brought to recover from the contractor and his sureties the damage alleged. The sureties interposed a demurrer, on the ground that the plaintiff did not state facts sufficient to constitute a cause of action, and the question was whether a surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by subsequent changes in the work made by the principals without the consent of the surety. It was claimed on

behalf of the United States that the change made in the original contract by the supplemental agreement was within the contemplation of that contract, and must be deemed to have been assented to in advance by the surety. The trial court held that this change was not within the scope of the original contract, but was such a change that exonerated the surety from liability for the subsequent dereliction of his principal. This view of the contract was affirmed by the Supreme Court, which, after citing authorities relating to the liabilities of sureties, said:

'The proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. United States v. Freel (C. C.), 92 Fed. 299.'

It will be observed that, unlike the case before this court, the change in the original contract was made in accordance with the terms of the contract and the change agreed to by the parties to the contract in writing, but, like the

present case, the consent of the surety to the change was not obtained, and it was upon that fact that the surety was held not liable. It will be observed further that the contractor was to be compensated for the additional expense in making the change, so that the surety was in no way injured by the change in the contract. The surety was, nevertheless, held discharged from liability. This case is a sufficient answer to the contention of the United States in the present case that the change in the contract was not material to the plaintiff in error. It is not necessary to review the cases bearing upon this last question. They are numerous, and the law has been authoritatively determined. The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the contract, the surety is not liable, and if a change is made in the contract without his consent his liability is at an end, even though it may appear that the change is for his benefit."

This court reached the same conclusion in the case of Axman against United States, 167 Fed. 922.

The case of Axman v. United States was again before this court and the judgment of the trial court affirmed in United States v. Axman, 193 Fed. 644.

In United States Fidelity and G. Co. vs. United States, 194 Fed. 611, this court again approved the

holding, and in the opinion page 616, says:

> "The government, pursuant to the terms of the contract between it and Boggs, by reason of his default, took from him the possession of the premises as well as all of his material, machinery, and tools thereon for the purpose of having, at his expense, his contract fulfilled; and for that his surety bound itself, but not for the fulfillment of any essentially different contract. It is true that by its contract with Boggs, the government reserved to itself the right 'to make changes, alterations or omissions from or additions to the work and materials herein provided for'; that is to say, changes in, additions to, or omissions from the work covered by the plans and specifications of the contract. This is plainly shown by the subsequent provisions of article 3 of the Bogg's contract in which the reservation occurs. * * * * That reservation, in our opinion, affords no ground for holding the government entitled to make a substantially different contract with a third party at the expense of the former contractor and his surety. And such was the ruling of the Supreme Court in a similar case. In speaking of a like clause in the case of United States vs. Freel, 186 U. S. 309, the court said:
>
> 'Coming, then, to the question of the effect on the responsibility of the surety of the sup-

plemental agreement of August 17th, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety and extinguished his liability. The seventh action had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense and gave an increased time of performance.' We do not understand the case just referred to (United States v. Freel) to be overruled by the very recent decision of the same court in the case of United States vs. McMullen, et al (Decided January 9th, 1912), 222 U. S. 460. * * * * In the case of American Bond Company vs. United States, 167 Fed. 910, 93 C. C. A. 310, the question here involved was carefully considered by us, and being satisfied of the correctness of that decision, it is useless for us to pursue the subject further. Boggs' Surety is not, in our opinion, liable in this action for the reason that the government did not complete Boggs' contract, as it had the right to do, but instead chose to have the structures erected in a substantially different manner,

pursuant to the contract made by it with Owen."

The Freel case and also American Bond Company vs. United States (Supra) are again cited with approval and upheld by this court in United States vs. Weisberger, et al, 206 Fed. 645.

(c) The contract of December 18th, 1911, provided that the Bridge Company should commence the construction of the bridge on or before August 1st, 1912, and complete the construction of the bridge on or before February 1st, 1913. This time limit was not extended in the contract of February 5th, under which additional compensation in the amount of $3487.80 is provided for, presumably for additional construction, which increased the burdens of the Bridge Company within the time fixed by the contract of December 18. The time limit element in the contract of December 18th, 1911, was an essential feature of that contract and a material change in the structure to be built within that time, without the consent of the surety and without extending the time limit correspondingly with the increased structure would operate to release the surety. The fact that the county provided additional compensation in the amount of $3487.00 to the contractor for the construction of a bridge under the contract of February 5th, 1912, conclusively establishes that the structure was substantially and materially different than the one called for under the contract of December 18th, 1911. The fact that no addi-

tional time was allowed for the presumed additional construction conclusively shows that the burdens of the contractor were substantially and materially increased for a consideration, but in which consideration the bond company in no way was to share. An increased burden placed upon the Bridge Company without the consent of the surety, without extending the time within which the increased work was to be done operated to materially change the obligations of the Bridge Company and operated to discharge the surety because the change was made without the surety's knowledge or consent.

In O'Neal, et al, vs. Kelley, 65 Ark. 550, 47 S. W. 409, in the opinion, the court says:

> "This is an action upon a bond given by O'Neal to Kelley for the performance of a building contract. The contract for the full performance of which the bond was executed required that, for the sum of $2,000 to be paid by Kelley, O'Neal should furnish materials and erect a brick building, the lower story of which should be 96 feet long and 14 feet high, and the upper story 75 feet long and 12 feet high. During the progress of the work, O'Neal contracted with Kelley that for the additional sum of $25 paid him by Kelley, he would build the upper story 96 feet long, instead of 75 feet, as required by the original contract. The appellant sureties contend that this alteration of the contract discharged them

from further liability on the bond, and we are of the opinion that this contention must be sustained.

"The alteration of the contract shown in this case was material, and there is nothing to show that the sureties consented thereto. It required that O'Neal should erect a building of dimensions different from that required by the original contract, and for which he was to receive a different consideration. It called for the erection of a more expensive building, but no extension was made in the time within which the building was to be completed. As the sureties had undertaken that O'Neal should complete the building within a limited time, an alteration of the contract by which he was required to build a larger and more expensive building within the same time was, in our opinion, not only material, but directly against the interest of the sureties; and, as the same was made without their consent, it clearly operated to discharge them."

3. The county and the Bridge Company without the consent of the surety changed the terms of the contract of December 18th, 1911, with respect to the payments to be made for the construction of the bridge in question, which action on the part of the county released the surety from any obligation for the faithful construction of the bridge under the terms of the contract. The county without the consent of the surety was not at liberty to

change material provisions of the contract and still insist upon the surety being held to the performance of the contract. A provision in the contract for alterations, deviations, additions or omissions, and for a determination of the fair and reasonable value to be added or deducted on account thereof, will not aid the county on the question of changing the time and manner of payment for the work to be done under the contract.

In Blackburn v. Morel, 13 Ga. App. 516, 79 S. E. 492, the court in the opinion says:

> "The fact that the contract provided for change and alteration in the plans of the building has no bearing on the proposition to which we have referred, for there is a marked difference between a change as to the method and amount of the payments and a stipulation providing for changes in the structure to be erected."

The situation here presents an extreme case. The contract of December 18th, 1911, provided that 25 per cent of the contract price should be paid upon the completion of the concrete piers, and 50 per cent upon the arrival of the steel for the bridge at the bridge site, and that the remaining 25 per cent should be paid upon the completion and acceptance of the bridge. (64.)

The county and the Bridge Company, under resolution dated July 26th, 1912, removed from the contract the above terms for payment, and substituted in place thereof provision for paying one-

half of the contract price in advance of the arrival of any of the materials or the doing of any of the work (88-89), and provided for and paid an additional $12,500 before the concrete center pier was constructed, so that before any substantial work was done upon the bridge, more than $25,000.00 had been paid the contractor. The courts have held that the provision in the contract to withhold payment or partial payment until the completion of the work, according to the contract, was an essential element of the contract, and a material inducement to the contractor to complete the work within the time and in the manner that would entitle him to be paid under his contract, and that a material change in the time or manner of payment, without the consent of the surety would thereby release the surety.

In Backur vs. Archer, et al, 109 Mich. 666, 67 N. W. 913, the court in the syllabus, says:

> "Sureties on a contractor's bond conditioned for the principal's faithful performance of a building contract, which provides that the consideration is to be paid to the principal at times therein specified as the work progresses, are released from all liability on the bond, if the payments are made before they are due by the terms of the contract."

And in the opinion the court says:

> "In Brant on Suretyship (Section 397) it is said: 'A surety for the completion of work to be performed by the principal where, by

the terms of the contract the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides. The surety is thereby deprived of the inducement which the principal would have to perform the contract in due time, * * * * and it is no answer to say that it is to the advantage of the surety, or that he has sustained no prejudice.' Warre v. Calvert, 7 Adol. & E. 143; Calvert v. Dock Co., 2 Keen 644. In the latter case the court said of a premature payment: 'What the company did was perhaps calculated to make it easier for Streather to complete the work if he acted with prudence and good faith, but it also took away that particular sort of pressure which the contract was intended to be applied to him.' The question was again fully discussed, and the doctrine of Calvert v. Dock Co. affirmed, in Navigation Co. v. Holt, 95 E. C. L. 550. The American authorities are in harmony with the foregoing English cases."

In Board of Com'rs v. Braham, et al, 57 Fed. 179, the court in the opinion, page 183, says:

"In the case at bar over $10,000.00 were paid to the principals before, by the terms of the contract, they were entitled to receive anything. Such a gross departure from the terms of the contract, to the prejudice of the sureties, operates to release them from the bond in suit, unless the false and fraudulent conduct

of the principals in procuring the payment deprives the sureties of the right to take advantage of it. * * * * By the terms of the contract the plaintiff, or its engineer, was required carefully to estimate the amount of work completed before making any payment. The performance of this duty was important, for the protection of the sureties. But, if the plaintiff had the right to rely on the representations of the contractors, that would have been a justification for the payment of no more than $7480.00; so that the fraudulent representations, relied on, afford no excuse for the payment to the contractors of the sum of $10,046.68. In no just sense can it be claimed that the plaintiff was induced to make the payment by the fraudulent representations of the contractors. It had no right to rely on such representations, and it was bound, either in person or by its engineer, to make the estimate of the work done for itself. If the plaintiff was misled, it was through its own fault, and the failure to perform what was required of it by the contract. In such case, it cannot shift the consequences of its own fault and want of care onto the sureties. Manufacturing Co. V. Kimmel, 87 Ind. 560."

In First National Bank of Montgomery vs. Fidelity & Deposit Company of Maryland, 145 Ala. 335, 40 So. 415, in the syllabus, the court says:

"Making payments before they are due un-

der the terms of a building contract will release a surety on the contractor's bond."

And further in the opinion the court says:

"It is a maxim of law that all parties, whether principal or surety, who reduce their contracts to writing, have a right to insist upon the terms of the contract as written; and it does not lie in the power of the courts to say that, although a party has contracted to do one thing, yet he has done something else, which is more beneficial to the other party, and is therefore entitled to the enforcement of the contract. When a party enters into a contract to do certain work and on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made. The terms of the contract become a part of the terms of the bond. Otherwise the surety could never know what obligation he was assuming. The contracts are made at the same time. The surety's bond recites that, whereas the building contract has been made. Then, in the absence of any explicit declaration to that effect, it is difficult to see how a court can undertake to say that certain provisions are made for the benefit of the principal alone, and can be waived or changed by him, without the consent of the surety. This is a matter, however, that has been so thoroughly discussed by the courts in England and

in this country, and the trend of the best authorities is so evident, that is seems useless to go over the arguments of the courts."

In Evans vs. Graden, 125 Mo. 72, 28 S. W. 439, in the opinion the court says:

"The defendant as a surety has a right to stand upon the agreement that Park would not pay Rider & Son during the progress of the work, more than 70 per cent of the value of the work done; and if Park, during the progress of the work paid Rider & Son more than 70 per cent of the value of the work done, without the consent of the sureties, he thereby discharged the defendant."

In Cowdrey v. Hahn, et al, 105 Wis. 455, in the opinion the court says:

"The entire contract price was paid by Cowdrey at the time when $275 worth of work (which must be considered a substantial part thereof) was still unfinished, to the knowledge of Cowdrey. Not only was the $275 not then due, but 15 per cent of the remainder of the contract price had not then become due, so that in all nearly $800 was paid upon the contract long before it was due. The payment of this sum to the contractor before it was due must be regarded as amounting to a substantial modification of the contract by the principals without the consent of the sureties, and hence, upon familiar principles, relieves them from liability."

In City Council of Greenville v. Ormand, et al, 44 S. C. 116, the court in the opinion says:

"The disregard by the creditor of the provisions for the reservation of 10 per cent of the amount due on the engineer's estimate was a material variation of, or departure from, the contract. The surety is bound, and only bound, 'to the extent and in the manner and under the circumstances pointed out in his obligation,' as stated by Mr. Justice Story in Miller v. Stewart, 9 Wheat. 703. This principle is recognized by all the authorities. Nor is it essential that the alteration of the contract should be injurious to the surety. The surety is bound by the contract which he makes, not by some contract which he did not make, even though the latter may be more favorable than the former. Jackson v. Patrick, 10 S. C. 197; Gardner v. Gardner, 23 S. C. 592. The contract made by the sureties expressly provided for the 10 per cent reserve. It is a mistake to suppose that this provision was inserted for the benefit of the city of Greenville alone, and that the city might waive it. It was designed to secure the satisfactory completion of the work according to the specifications of the contract, for which the sureties were liable, and was for their benefit as well as for the benefit of the city. The principals dealt with each other as if there was nothing whatever in the agreement in refer-

ence to the 10 per cent reserve, in effect striking that provision from the contract. This the principals could do, so far as they were concerned, but not so far as the sureties are concerned. The good motive which actuated the city council in disregarding this provision, viz., to enable the contractor to continue the work, cannot help the city in this contention, since it failed to do what was essential to bind the sureties—procure their consent. It may be that the payment to the contractor in full without regard to the stipulated reserve kept the work going to completion, and in this way was beneficial to the sureties; but, as shown above, the surety's liability on a contract materially altered by the principal is not to be determined by ascertaining whether he was injured or benefited by the alteration, but by the fact of alteration. It is quite easy to understand why the sureties in this case might not have signed the contract except for the provision as to the 10 per cent reserve. If by reason of the death or insolvency of the contractor the work should stop, and it should become the duty of the sureties to carry on the work, or indemnify the city for damages, the reserve might protect the sureties against final loss. Such reserve, too, would be very potent in holding the contractor to his contract."

In Glenn County vs. Jones, et al, 146 Cali. 518, 80 Pac. 695, in the opinion, the court says.

"In our opinion, the obligation of the principal was altered in a material respect without the consent of the sureties. The contractor was under the obligation of placing all the materials on the building site before he was entitled to any money under the terms of his contract. By the payment to him before he had done so, he secured the money before performing his obligation. The pressure which would have been exerted upon him to continue in the performance of his contract, and place all the materials on the site, was removed when he received the money. He received it before he was entitled to it, without the consent of the sureties. The sureties had bound themselves upon the assumption that the plaintiff would keep its contract in good faith. We can see no difference in principle if the whole of the contract price had been paid before any of the materials were placed on the ground. In such case could any one doubt that the sureties would have been exonerated? The risk of guarantying the construction of a building, to be paid for when completed and accepted, is quite different from the risk of guarantying its construction if the whole contract price should be paid in advance. In the one case the contractor can only get the money by performing his contract while the other he would only pay out the money already received in performing it. In this case the sure-

ties agreed and guaranteed that Jones would place all the materials on the building site, on condition that he was to receive no money until he had done so. They did not agree that, if paid in advance, he would place such materials on the site. By this payment, the hope of reward for further performance was lost, and the temptation to act dishonestly was increased."

In Fidelity & Deposit Co. vs. Agnew, 152 Fed., 955,

"The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect, or engineer, whether a percentage is to be retained therefrom, until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract; and, upon payment being made in disregard of it, there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released. The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as hold-

ing out an incentive; and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as matter of law. Stream Navigation Co. v. Bolt, 6 Com. Bench N. S. 550; Calvert v. London Dock Co., 2 Keen 639; Prairie State Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; Shelton v. American Surety Co. (C. C.), 127 Fed. 736, affirmed 131 Fed. 210, 66 C. C. A. 94; Welch v. Hubschmitt, 61 N. J. Law, 57, 38 Atl. 824; Village of Chester v. Leonard, 37 Atl. 397, 68 Conn. 495; Fitzpatrick v. McAndrews, 12 Pa. Co. Ct. Rep. 353. This is too well established to be controverted, and the only question is how far it applies here."

In Justice v. Empire State Surety Co., 209 Fed. 105, in the opinion, on page 107, the court refers to the case of Fidelity and Deposit Company v. Agnew, 152 Fed. 955, being a decision of the Circuit Court of Appeals of that Circuit, and with reference to the holding of the court in the Agnew case, to the effect that the withholding of payment until the work was done as required by the contract operating as an incentive to the doing of the work as required by the contract, and further in the opinion at page 108 says:

"After a somewhat careful examination of the cases, I have been unable to find any case in which the relaxation of the rule of strictissimi juris was extended as between the sure-

ty and the obligee in the bond to the extent of requiring proof of actual injury in the case of breach of the terms of the bond by anticipation of payments by the obligee to the contractor. In such case, for the reasons stated in Prairie State Bank v. United States and Fidelity Co. v. Agnew, and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variance from the terms of the contract."

This case was reviewed by the Circuit Court of Appeals, 3rd Circuit, and found reported in Vol. 218 Fed. 802, where the judgment is affirmed on appeal, and wherein the court on appeal in the opinion says:

"Moreover the advancements are so large and substantial that it may be accepted as self-evident that the alteration by the plaintiff proved prejudicial to the surety, if such showing should be deemed important."

In National Surety Company vs. Long (8th Circuit), 125 Fed. 887, the surety was released because of a departure under the terms of the contract without the surety's consent having been obtained. The court in the opinion says (p. 892):

"The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account, he cannot enforce the fulfilment of the covenant of the defendant. He

who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform."

In Simonson v. Thori, 36 Minn. 439, 31 N. W. 861, the court in the opinion at page 862 says:

"In anticipating the installments, and otherwise disregarding the conditions of the contract they were practically so modified that it was not the contract to the performance of which the plaintiffs had bound themselves as surety. In such cases the sureties may be deprived of the inducements which the principals would have to perform in due time as the contract required."

4. The evidence fails to show that the proximate cause of the failure of the bridge was the use of the particular piling in question, and the failure of the bridge company to drive such piling as directed in the specifications of December 18, 1911.

(a) In order to fix a liability upon the bond company for the failure of the bridge, it is essential that the plaintiff show that the bridge company did not construct the bridge according to the plans and specifications therefor, and that such failure was the proximate cause of the failure of the bridge. In other words, if the bridge would have fallen, notwithstanding piling were used strictly in accordance with the specifications made part of the contract of December 18th, 1911, then the proximate cause of the failure of the bridge would

not be the kind of piling used, or the manner in which they were driven. The court in discussing the question at page 123 of the record, in its opinion, says:

> "The failure to drive the piles to refusal is a sufficient and reasonable cause for the destruction of the bridge. It is clear the undermining was so great that these piles could not resist it. That it might also have been so great that these piles driven to whatever unknown depth would have been refusal, could not have resisted it, is mere conjecture and not permissible."

If it was a part of the plaintiff's case to show that the proximate cause of the failure of the bridge was the failure to use the kind of piling in the manner specified in the contract of December 18th, 1911, then that burden was not met by the plaintiff. For, as the court says in its opinion, it was mere conjecture as to whether the bridge would have fallen anyway if the required piling had been used in the required manner.

(b) If the Bridge Company used piling called for in the specifications in the contract of December 18th, 1911, and had complied with those specifications in the driving of the piling and the bridge had failed because of the use of the piling in the foundation of the bridge, the Bond Company would not be liable to the county for the failure of the bridge. The obligations of the bond were that the bridge would be constructed in accordance

with the plans and specifications, which were a part of the contract for the performance of which the bond was given. The bond was not conditioned that the plans and specifications for the bridge were sufficient.

If the county directed the use of 22 foot piling 8x8 inches square in place of piling 12 inches at the larger end and 9 inches at the smaller end, the Bridge Company by the terms of the contract would be required to use such piling and such piling would be within the contract and plans and specifications. The contract by its terms provides that the county shall determine the length of the piling. The county through its county engineer and commissioners were present when the piling were being used, so that the court must presume that the county directed the use of the 22 foot piling, 8x8 inches square. The use of such piling by direction of the county would result in a modification of the specifications attached to the contract of December 18th.

The court in this case does not know what size or kind of piling were required to be used under the contract for which the bond was given, because the terms of that contract are not shown in this record or in the case, and if used in accordance with the modified plans and specifications in that respect the failure of the piling to sustain the bridge would not fix a liability upon the bond any more than a failure of the piling as specified in the original plans and specfications would have fixed

a liability upon the Bond Company. The fact is conclusively shown that the piling used would not have withstood the blow of a 2000 pound hammer falling 20 feet, which would excuse the Bridge Company from attempting to drive the piling with that kind of a hammer falling that distance. The power reserved in the county to direct the kind of piling to be used and the length of the piling would control the provisions with respect to the driving of the piling, as the greater would include the less. If the piling 22 feet long, 8x8 inches square would not withstand the blow of a hammer weighing 2000 pounds, falling 20 feet, within 400 per cent, and the county directed the use of that length and kind of piling, that fact would result in a modification of the requirements in the specifications for the driving of the piling. The presence of the county through its engineer and commissioners at the pier while the foundation was being put in and the participation of the county in the construction of the foundation of the pier conclusively establishes the consent of the county, and by reason of the reserved power in the contract, conclusively presumes the direction of the county for the use of the particular piling.

If the piling used, as the record conclusively shows, would not have withstood the blow of a 2000 pound hammer, falling 20 feet with 400 per cent, then as a mere matter of mathematical calculation, we know that piling 9 inches in diameter at the smaller end and 12 inches at the larger end

would not withstand such a blow, because the quantity of material in the 9x12 inch piling would not exceed that in the 8x8 piling by 400 per cent, so the record shows that the piling specified in the contract of December 18th would not have withstood the blow of the hammer **if 22 feet long.** The length of the piling used is almost controlling in the matter of the weight of the hammer and the distance it is to fall in driving the piling.

The specifications in express terms direct that the county shall determine the length of the piling, and by determining that 22 foot piling should be used, the county modified the requirement with respect to the driving of those piling, because of the impossibility of driving them as specified in the contract of December 18th, 1911, which did not specify the length. The county had the power reserved in the contract to specify the length of the piling which at all times controlled the specifications as to the weight of the hammer and the distance it should fall.

(c) The record shows that the use of concrete in the base of the pier stopped while they were still in sand and gravel, so that the concrete was not carried down to a solid foundation. The use of piling was much cheaper, and the county reserved the right to determine which should be used. The record shows that if the matter had been left to the Bridge Company, piling would not have been used at all, but the concrete would have been carried on down. (p. 104.) No one ques-

tions that if the concrete had been carried down to a solid foundation below the sand and gravel that the water would not have cut under the concrete and the pier would have stood. It was because the water cut out the sand and gravel under the concrete in the foundation of the pier and exposed the piling, which were insufficient to carry the weight of the pier and bridge, that the bridge fell. This of course would have been true because of the weight of the pier and bridge, if the piling 12 inches at the top by 9 inches at the bottom had been used. It would not have been true if the concrete had been carried down below the sand and gravel to solid foundation. The county determined the extent to which the concrete should be carried down in the base of the pier. In this situation the county fails to show that the proximate cause of the failure of the bridge was the failure of the Bridge Company to drive a certain kind of piling to refusal.

The bond attached to the complaint recites that it is given for the performance of a "new contract" for the construction of the bridge in question attached to which new contract are modified plans and specifications. The terms of that contract and the requirements of those specifications were not shown, so there is a total failure to fix liability upon the bond company because of the use of piling in the base of the pier as alleged in the complaint. There is no connecting link between the bond sued on and the contracts made a part of the

complaint and there is no connecting link between the piling used and the requirements of the specification in the contract on account of which the bond was given. In this situation the plaintiff must fail in sustaining a recovery.

Whether the bridge would have failed or not if piling had been used as specified in the contract of December 18th, 1911, is a mere matter of conjecture, but in order to determine the proximate cause of the failure that matter would necessarily have to be shown.

We respectfully submit that the judgment should be reversed and the action dismissed.

CLARENCE H. GILBERT,
Portland, Oregon.
GUNN, RASCH & HALL,
Helena, Montana.
EDMUND C. STRODE,
Lincoln, Nebraska.
COY BURNETT,
Portland, Oregon.
Attorneys for Plaintiff in Error.